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No. 86-1536

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1986

WADE POWELL AND FREDA POWELL, HIS WIFE, AND ERWIN WHITE AND SUSAN WHITE, HIS WIFE,

Petitioners,

v.

STATE OF FLORIDA, MUNROE REGIONAL MEDICAL CENTER, WILLIAM H. SHUTZE, M.D., KEITH GAUGER, THOMAS M. TECHMAN, M.D., NORTH FLORIDA LIONS EYE BANK, INC., THE MEDICAL EYE BANK, INC., FLORIDA LIONS EYE BANK, INC., FLORIDA SOCIETY OF OPHTHALMOLOGY, INC., METROPOLITAN DADE COUNTY AND THE FLORIDA MEDICAL ASSOCIATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

OBJECTION BY RESPONDENTS WILLIAM H. SHUTZE, M.D., THOMAS M. TECHMAN, M.D., AND KEITH GAUGER, IN RESPONSE TO MOTION TO PARTICIPATE AS AMICUS CURIAE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REASONS FOR OBJECTION IN RESPONSE TO MOTION TO PARTICIPATE AS AMICUS CURIAE 1

TABLE OF AUTHORITIES

Page

CASES

Barrows v. Jackson, 346 U.S. 249, 73 S.Ct. 1031 (1953) 2

Florida v. Powell, 497 So.2d 1188 (Fla. 1986) 2

Phillips Petroleum Co. v. Shutts, — U.S. —, 105 S.Ct. 2965, 86 L.Ed.2d 593 (1985) 3

Singleton v. Wulff, 428 U.S. 106, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976) 3, 4

Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) 2

CONSTITUTIONAL PROVISIONS

Free Exercise Clause 2, 3

STATUTES

Florida Statute § 732.9185 1

REASONS FOR OBJECTION BY RESPONDENTS' WILLIAM H. SHUTZE, M.D., THOMAS M. TECHMAN, M.D., AND KEITH GAUGER, IN RESPONSE TO MOTION TO PARTICIPATE AS AMICUS CURIAE

Pursuant to Rule 36.3 of the Rules of the Supreme Court of the United States, Respondents William H. Shutze, M.D., Thomas M. Techman, M.D., and Keith Gauger, by their attorneys, object to the motion of the Rabbinical Association of Greater Miami, of Temple Beth Or, and of Rabbi Rami Shapiro, for participation as amici curiae in support of the grant of a writ of certiorari on behalf of Petitioners. Respondents object to the participation of these proposed amici curiae on the following grounds:

1. While amici curiae often can provide helpful information and insight on issues presented and pending on a case, that is not the role that proposed amici seek in this case.

2. Proposed amici candidly seek leave to participate on behalf, and in support, of Petitioners.

3. Proposed amici avowedly assert that legislation authorizing the removal of corneal tissue, such as the Florida cornea removal statute, *Fla. Stat.* § 732.9185, "must respect existing religious principles," and that they intend to advise the "[C]ourt of Jewish law concerning the matters raised in this case" (Motion for Participation at 3.)

4. In their brief in support of the grant of a writ of certiorari, proposed amici explicitly argue that "the statute permits and authorizes state action which violates individual religious interests and inhibits the free exercise

of religion" (Brief at 11); and they discuss at length Judiac law, and orthodox Jewish thought and religious tenets.

5. Nowhere in the record of this case are there pleadings, much less evidence, of any persons aggrieved by, and raising objections to, the cornea removal statute on grounds that it interferes with, or infringes upon, precepts of their religious faith.

6. The Florida Supreme Court rejected an attempt to introduce issues based on the Free Exercise Clause for this very reason:

> The record contains no evidence that the Appellees' [Petitioners'] objections to the removal of corneal tissues for human transplants are based on any 'fundamental tenets of their religious beliefs.' *Wisconsin v. Yoder,* 406 U.S. [205] at 218, 92 S.Ct. [1526] at 1534 [(1972)]. '[T]he very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests.' *Id.* at 215-16, 92 S.Ct. at 1533.

Florida v. Powell, 497 So.2d 1188, 1193 (Fla. 1986).

7. Proposed amici lack the requisite standing to introduce this Free Exercise claim into this case because the interests which they assert are hypothetical to the parties and to the record before the Court in this case. "Ordinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party." *Barrows v. Jackson,* 346 U.S. 249, 255, 73 S.Ct. 1031, 1034 (1953).

> Federal courts must hesitate before resolving a controversy, even one within their constitutional power

> to resolve, on the basis of the rights of third persons not parties to the litigation. The reasons are two. First, the courts should not adjudicate such rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not. . . . Second, third parties themselves usually will be the best proponents of their own rights. The courts depend on effective advocacy, and therefore should prefer to construe legal rights only when the most effective advocates of those rights are before them. The holders of the rights may have a like preference, to the extent they will be bound by the courts' decisions under the doctrine of *stare decisis*.

Singleton v. Wulff, 428 U.S. 106, 113-14, 96 S.Ct. 2868, 2874, 49 L.Ed.2d 826 (1976). These "[a]dditional prodential limitations on standing," *Phillips Petroleum Co. v. Shutts*, — U.S. —, 105 S.Ct. 2965, 2971, 86 L.Ed.2d 593 (1985), apply with even more force to amici curiae whose legal position would inject issues unsupported by any evidence, and unrepresented by any parties, in the case.

8. There is no relationship between Petitioners and proposed amici that would warrant their raising a constitutional Free Exercise issue, otherwise unsupported by the record in this case. Neither is there any suggestion that third persons—not parties to this case—who might possess a genuine basis in religious belief to object to the statute in question, would encounter obstacles or impediments making it difficult for them to do so. Hence, the "two factual elements," to which "the Court has looked primarily . . . to determine whether the [general] rule [against standing to assert the constitutional rights of nonlitigants] should apply," militate against any excep-

tion that would allow proposed amici to present their Free Exercise claim. *Singleton v. Wulff*, 428 U.S. at 114-16, 96 S.Ct. at 2874-75.

9. Accordingly, the participation of proposed amici in this case is inappropriate in the light of (a) Petitioners' claims; (b) the evidentiary record; and (c) the position that amici would introduce, in this case.

The Motion for Participation of the Rabbinical Association of Greater Miami, Temple Beth Or, and Rabbi Rami Shapiro, as Amicus Curiae in Support of the Grant of a Writ of Certiorari, should be denied.

Respectfully submitted,

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